INTERIM REPORT OF THE LABOUR MANAGEMENT REVIEW COMMITTEE ON THE REVIEW OF THE EMPLOYMENT STANDARDS CODE

Introduction

On February 3, 2006, the Honourable Nancy Allan, Minister of Labour and Immigration requested that the Labour Management Review Committee (LMRC) convene to review the Department's package of proposals as they relate to the review of *The Employment Standards Code* and associated regulations.

The LMRC formally met five times over the past month and a half with the goal of developing consensus recommendations on the 17 proposals developed by the Department. Department officials also met separately with each group. In addition to these proposals the Committee was asked to respond to four additional administrative changes brought forward by the Department. The Committee has addressed all issues requiring a statutory change and some of the regulatory proposals. The Committee is requesting until June 1, 2006 to address issues entirely regulatory in nature.

The Committee exerted considerable effort over a short time to conduct a review of the proposals. The Committee took into account a variety of factors that were used as a lens to review and comment on the proposals including: the interests and needs of their respective constituencies; and an analysis of how Manitoba's employment standards legislation compares to other Canadian jurisdictions. While each proposal was evaluated on its own merits, the Committee approached the proposals as a package in order to address some fundamental differences. This approach resulted in all members making significant compromises in some areas while allowing members to address the priority interests and needs of their respective constituencies in other areas.

Given the diversity of the Department's proposals the Committee feels a strong sense of accomplishment in reaching consensus recommendations on all 17 proposals. On behalf of the Committee I am pleased to provide these consensus recommendations.

LMRC Joint Recommendations

1.0 Exclude Managers from Hours of Work and Overtime

The Department proposed that managers be excluded from hours of work and overtime based on the following criteria: a manager must exercise direction and control over others; exercise control over their own work schedule (not subject to requirements and restrictions that apply to most hourly workers); be primarily engaged in management functions; and have authority over scheduling of employees; hiring and firing; promotions; raises; and disciplinary measures.

The Committee concurs with the Department's proposal that a manager be excluded from hours of work and overtime. After considerable discussion on this issue the Committee recommends that the Department's proposed criteria for the definition of manager be amended. The Committee recommends that the definition for manager be taken from *The Labour Relations Act*. That is, *a manager is a person that performs management functions primarily*. The portion of *The Labour Relations Act* dealing with confidential capacity is not appropriate in the Employment Standards context and therefore *should not* form part of the recommended definition of manager.

The Committee feels that this definition adequately represents the majority of criteria proposed by the Department. The Committee reviewed case law showing that *The Labour Relations Act* definition establishes a high threshold for being excluded and adequately captures the proposed criteria of "exercising direction and control over others," "primarily engaged in management functions," and "has authority over scheduling, hiring and firing, promotions, raises, and disciplinary measures." Additionally, the adoption of *The Labour Relations Act* definition provides a long history of jurisprudence that is widely understood in the Manitoba context. The Committee felt is was not appropriate to include the criteria, "exercises control over their own work schedule" because no other Canadian jurisdiction includes this criteria.

2.0 Exclude Some Salaried Employees from Hours of Work and Overtime

The Department proposed an exclusion for some salaried workers based on the following criteria: the salaried employee must earn a base salary that meets or exceeds a specific threshold that may be linked to an independent factor (e.g., Average Weekly Earnings, CPI, Minimum Wage, etc.); the employee exercises control over their own work schedule (not subject to requirements and restrictions that apply to most hourly workers); and the base salary does not vary each pay period.

The Committee concurs with the Department's proposal to exclude some workers that meet a specific earnings threshold and have control over their own work schedule. Rather than limit this proposal to salaried workers, the Committee recommends that this provision be extended to *all workers* that meet a minimum earnings threshold *and* exercise control over their own work schedule. As a result, some workers may be excluded even if their earnings vary each pay period.

The Committee recommends that the Department establish a threshold equal to at least two times the industrial average wage (for example, the 2005 industrial average wage of $34,237 multiplied by two equals $68,474). This threshold would be adjusted yearly based on the change to the industrial average. However, in addition to the earnings threshold, workers must also enjoy *substantial* control over their own work schedule. Both conditions have to be met.

3.0 Introduce Provisions for Averaging Permits and Industry Wide Variances

The Department proposed that the Director of Employment Standards be given the ability to issue permits for averaging daily or weekly hours over a specified time-frame and that the Director could issue an averaging permit for up to three years. The Director would consider the following criteria prior to issuing the variance: Any custom, practice, or agreement that applies to the employment or business; demonstrated agreement by the majority of employees who would be affected by the variance; any effect the variance could have on the safety, health, or welfare of the affected

employees or members of the public; and any current or past contraventions of the Code or the regulations on the part of the employer.

The Committee concurs that it is appropriate to move the process for averaging permits and variances from the Manitoba Labour Board to the Director of Employment Standards. The Committee also concurs with the criteria proposed by the Department to be used by the Director when evaluating applications for permits. After some discussion the Committee supports the current MLB process of making permits publicly available, including posting the permit in the workplace.

The Department also proposed that those industries regularly granted variances by the Manitoba Labour Board such as landscaping (10 per day / 50 per week); remote fishing resorts (12 per day / 60 per week); application of agricultural chemicals (10 per day / 50 per week) be placed in the Regulation.

The Committee supports placing certain industry wide variances into regulation so long as those industries are well defined so as to prevent abuse.

4.0 Compressed Work Week for Individual Employees

The Department proposed that individual employers and full-time workers be allowed to mutually agree in writing, without approval of the Director of Employment Standards, to four standard ten hour shifts per week. This would improve work-life balance for employees without increasing overtime liability for employers. Restrictions would be put in place to ensure protection of workers and employers including: The compressed work week schedule is outlined in the written agreement to ensure employees know in advance when they would be working. Any hours worked outside of this schedule are deemed overtime hours; the schedule provides the employee with three days off per week; with two weeks notice the employer or employee may revoke the agreement; and finally, the Director may prohibit further agreements in a workplace where there is a pattern of non-compliance.

After considerable discussion the Committee recommends that this proposal should not form part of any legislative change. The recommended removal of this proposal assisted the Committee to reach a package deal for most of the other proposals.

5.0 Preventing Overtime Liability When Employees Exchange Shifts

The Department proposes that Manitoba adopt a system, under which workers could agree in writing to a shift exchange and as long as that request was approved by the employer there would be no overtime liability for the hours resulting from the shift exchange. In order to protect against potential abuse the Director of Employment Standards may prohibit further agreements in a workplace where there is a pattern of non-compliance.

The Committee expressed that this proposal is not a priority. After discussion the Committee recommends that the Department not include this proposal in any legislative change. A recommended removal of this proposal assisted the Committee to reach a package deal on most of the other proposals.

6.0 Change Method of Calculating Overtime for Incentive-Based Workers

The Department proposed that the following formula be adopted as a way to provide incentive-based workers with a premium for overtime hours worked: the worker's hourly "base" wage would be determined by dividing the total wages earned in a pay period by the total hours worked in that pay period, and the worker would be paid an additional half of the base wage for hours worked after 8 in a day or 40 in a week.

The Committee concurs with the Department that it is appropriate to provide a premium for overtime hours worked by these workers. The Committee partially accepts the formula proposed by the Department for calculating the overtime wage rate. In cases where the productivity of an employee cannot be measured during overtime hours, the overtime wage rate should be determined by calculating the employee's "base rate."

That is, dividing the employee's total wages in a pay period by the total hours worked during that period. The employee would receive time-and-a-half of that base rate for all overtime hours worked.

However, the Committee expressed concern that there could be abuse of this formula and therefore in cases where the employer measures productivity during the overtime hours the overtime rate should be time-and-a-half of the productivity (e.g. 1.5X the commission, piece-rate, etc earned during the overtime hours).

7.0 Implement Reporting Pay of Three Hours

As a result of submissions at the public hearings, the Department proposed that employees have minimum income security for reporting to work in the form of three hours of reporting pay.

The Committee agrees there should be some level of guaranteed hours to an employee that reports for work. However, the Committee recommends flexibility on the three hour rule to reflect the needs of many types of workers and work situations. As a result the Committee recommends that reporting pay be three hours or the regularly scheduled shift, whichever is less. This will ensure that some workers, such as students, still have the opportunity to regularly work shorter shifts in industries such as the retail sector and the hospitality sector.

8.0 Extend Some Provisions of the Code to Industrial Agricultural Settings such as Hog Farms, and in Specific Factory-Type Agricultural Operations such as Mushroom Farms

The Department proposed that some coverage be extended to workers in industrial agricultural settings.

The Committee expressed that it is not able to respond to this proposal at this time. The Committee feels that the current composition of the LMRC does not adequately reflect the knowledge and experience required to deal effectively with agricultural issues. The Committee requests additional time from the Department so that agricultural stakeholders can be invited to a meeting of the LMRC to assist with this issue.

9.0 Improve Protections for Domestic Workers

As a result of submissions made at the public hearing, the Department proposed extending protection to all domestic workers by defining domestics as "workers that primarily do household activities (cleaning, cooking), including childcare" and providing coverage to them regardless of the number of hours they work. The current exclusion for babysitters would remain and would not be affected by any change to the coverage of domestic workers.

The Committee is in the process of looking at whether it is appropriate to maintain some level of threshold for coverage. Considering that this is a regulatory change the Committee requests further time to deal with this issue.

10.0 Introduce Administrative Penalties for Repeat Violations

The Department proposed that the Director of the Employment Standards Division have the ability to issue an administrative penalty for prescribed violations of the Code, set at $500 per violation, per employee. The Director would use these penalties in cases of repeat offenders, and other tools such as education and voluntary compliance would continue to be important alternatives. Employers would have the right to appeal an administration penalty to the Manitoba Labour Board.

The Committee concurs with the Department's proposal to introduce administrative penalties on the above criteria. The Committee requested further time to deal with the

specific contraventions of the Code where an administrative penalty would apply as this would be a regulatory issue.

11.0 Eliminate Directors Liability for Wages in Lieu of Group Termination Notice

The Department proposed that directors liability apply only in group terminations where the director fails to show "due diligence" in acting to protect the interests of workers. Directors would still be liable for earned wages in group terminations.

The Committee is proposing a number of amendments and additional components to the Department's proposal. As mentioned in the introduction, a primary factor used by the Committee when evaluating each proposal was a desire to consider Manitoba's current legislation as compared to other Canadian jurisdictions. As a result, the Committee recommends that directors' liability should not apply to wages in lieu of group termination notice without the need for a "due diligence" test. Additionally, the Committee recommends that *a director not be liable for wages in lieu of notice in individual terminations*. This recommendation is consistent with the law in a majority of Canadian jurisdictions. A director would still be liable for earned wages in group or individual terminations.

12.0 Improve Ability to Recover Earned Wages from Directors of Companies

The Department proposed that Employment Standards have the ability to pursue the last director of the corporation for earned wages.

The Committee concurs with the Department's proposal to improve the ability to recover earned wages from a director. However, the Committee recommends an alternative method for holding a director liable. Rather than pursuing the last director of the corporation, the Committee recommends that the Employment Standards Division be given the power to deem a person, who manages or supervises a corporation, a director

for the purposes of holding an individual liable for earned wages. This would only apply in those situations where a corporation is operating without a director.

13.0 Introduce Graduated Notice for Termination of Employment

The Department proposed the following graduated system of termination:

Notice from employer to employee:

Years of Service	Minimum Notice Required
30 days but less than 1 year	1 week notice
1 year or more but less than 3 years	2 weeks notice
3 years or more but less than 5 years	4 weeks notice
5 years or more but less than 10 years	6 weeks notice
10 years or more	8 weeks notice

Notice from employee to employer:

Years of Service	Maximum Notice Required
30 days but less than 1 year	1 week
1 year or more	2 weeks

The Department proposed that employers not have the right to permanently withhold wages of employees that do not provide proper notice.

The Committee concurs with the Department's proposal. The Committee considered the graduated notice provisions in other Canadian jurisdictions and believed that the proposed changes were appropriate.

14.0 Provide Statutory Holiday Pay for Part-time Workers

The Department proposed that there be greater protection for part-time workers by removing the eligibility requirement that an employee work 15 of the 30 days prior to the holiday. As a result, holiday pay would be pro-rated like vacation pay, and it would be paid out at 5% of gross wages in the four weeks leading up to the holiday.

The Committee concurs with the Department's proposal. The Committee approached this issue as well by comparing Manitoba's current legislation to the legislation elsewhere in the country.

15.0 Codify and Limit Deductions from Pay

The Department proposed that the Code be amended so as to list permitted deductions (statutory deductions, court orders, etc) and prohibit deductions where there is no direct benefit to the worker, regardless of whether the worker has authorized the deduction.

The Committee concurs with the Department's proposal to prohibit deductions where there is no direct benefit to the employee. The Committee recommends that some deductions should continue to be permitted such as those required by statute; court orders or judgments; paying back previous advance on wages; correcting an overpayment of wages; premiums for company benefit plans; board and lodging; meals; voluntary employee purchases; transferable tools of the trade; and education that benefits the employee.

16.0 Codify Restrictions on Employment of Children

The Department proposed the following provisions regarding child employment: Prohibit employment of children in specified high risk industries such as mining, construction, etc; require the signature of a parent / guardian on any permit; during the school year, prohibit employment between 10:00 p.m. and 6:00 a.m., and limit employment to 20

hours per week to any child. Additionally, individuals under 18 would be prohibited from working alone between the hours of 10:00 p.m. and 6:00 a.m; and give the Director the ability to override restrictions in exceptional circumstances.

The Committee concurs with the Department's proposal with the following amendment: The Committee recommends that children be prohibited from working during the hours of *11:00 p.m.* and 6:00 a.m. The Committee believes this is more reflective of current working arrangements for many 15 year olds. The Committee acknowledges that the Director issues permits for any child employment in any event meaning the Director has the ability to restrict employment during other hours for younger children.

For consistency the Committee recommends that the Department's proposal on working alone should also be amended to reflect *11:00 p.m.* to 6:00 a.m. The Committee has requested further time to address the specific prohibitions on high risk employment as these are regulatory in nature.

17.0 Introduce Unpaid Leaves for Work-Life Balance

The Department proposed that all workers be entitled to: Three unpaid bereavement days for death in the employee's family; five unpaid family responsibility / sick days for the care, health or education of a child in the employee's care; the care or health of any other member of the employee's family; or the health of the employee. For purposes of these leaves "family" would be defined broadly to include any person in a close family relationship with the employee (e.g. a child raised by their aunt). In order to provide protections for employers a worker would have to provide as much notice as reasonably practicable and documentation where possible (e.g. sickness, death, etc).

The Committee concurs with three unpaid days bereavement leave proposed by the Department and recommends the following amendments to the proposal. The Committee recommends that three unpaid family responsibility / sick leave days would be appropriate. The number of days should be codified in the statute. For the purpose of

both leaves the Committee recommends that the definition of family be consistent with the definition used for compassionate care leave.

The Committee proposes that the legislation clarify that leave must be necessary for the employee to attend to their family responsibility / sick needs. The employee must provide as much notice as possible of their intent to take the leave, and the employer is entitled to reasonable verification that the leave was necessary in the circumstances.

Additional Proposed Changes Outside the Department's Package of Proposals

The Director of Employment Standards asked the Committee to respond to some additional proposed changes to the legislation. These changes were not part of the original package of proposals as they are more administrative in nature as compared to the other 17 proposals. The Committee offered the following recommendations.

Administrative Change # 1- Modify Deposit Requirements for referral to MLB

The Department proposed that the deposit requirements to refer an order for review by the Manitoba Labour Board be modified. This proposal would require the full payment of an order (currently the requirement is $300 per employee). If the order is more than $5,000 the employer may apply to the Board for a reduction in the amount of the deposit.

The Committee concurs with the Department's proposal.

Administrative Change # 2 - Board May Order Costs

The Department proposed that the Manitoba Labour Board may require the person to pay all or any part of any other party's costs in relation to the hearing, as the board considers reasonable, if in the board's opinion the person's conduct before the board was unreasonable; or having the matter referred to the board was frivolous or vexatious.

The Committee generally concurs with this proposal. However, the Committee recommends that there be clear language outlining the situations under which the Board may award costs.

Administrative Change # 3- Costs of Collection Added to Judgment

The Department proposed that the costs of collection incurred by the Department's collection agency be added to the judgment. The Department clarified that most cases are resolved voluntarily without the need to file an order into judgment. As a result, this proposal is trying to address the minority of complaints where the Department is forced to use a collection agency.

The Committee concurs with the Department's proposal.

Administrative Change # 4-Termination Exclusion of Some Sales of Businesses

The Department proposed that an additional exclusion be added to the requirements for an employer to provide notice in group or individual terminations. This exclusion would not require notice in those situations where there is a sale of business when the employees are immediately rehired by the purchaser on substantially the same terms and conditions of employment. This would eliminate the current Ministerial waiver process.

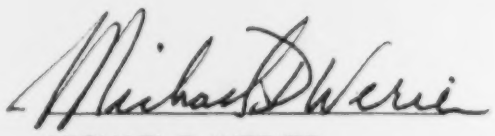
The Committee concurs with the Department's proposal. This proposal assisted the Committee in reaching a package agreement as it addressed some of the concerns with the termination proposal.

Conclusion

In closing, I would like to acknowledge the significant contributions made by all the Committee members who worked very hard in a spirit of collegiality to reach a consensus which would serve the best interests of all Manitobans.

In addition, I would like to acknowledge the invaluable assistance provided by the members of the Department.

Submitted this 18 day of May, 2006.



MICHAEL D. WERIER
Chair, Labour Management Review Committee